IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1041

ARNOLD J. HOPKINS, DIRECTOR, DIVISION OF PAROLE AND PROBATION, MARYLAND DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES,

Petitioner,

v.

VIRGINIA LYNNETTE FABRITZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONER

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Arnold J. Hopkins, Director of the Division of Parole and Probation, Maryland Department of Public Safety and Correctional Services, the petitioner herein, pursuant to Rule 24 of the United States Supreme Court, submits this brief in response to the respondent's brief in opposition to the State's petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

INTRODUCTION

The principal purpose of this brief is not to respond to the speculation conjured up by the respondent in her brief in opposition. Rather, the State seeks to call the Court's attention to the latest expression of the Court of

Appeals of Maryland on the meaning of the State's Child Abuse Law, Md. Code, Article 27, § 35A, a factor deemed by both sides as important in the consideration of the State's petition.

This recent decision, *Pope v. State,* No. 11, September Term 1978 (Md. Ct. App., filed Jan. 19, 1979), is not yet reported, but the relevant portion of the court's opinion is reprinted in an appendix to this brief. This opinion makes it abundantly clear that the principal elements of the Maryland Child Abuse Law are not as described by the Fourth Circuit, that Maryland's highest court is in sharp disagreement with the federal appellate court's revamping of the facts in this case, and that the Fourth Circuit egregiously erred in rewriting a vital state law to conclude that the respondent's conviction violated due process for lack of any evidentiary support.

ARGUMENT

THE UNITED STATES COURT OF APPEALS IMPERMISSIBLY REINTERPRETED MARYLAND'S CHILD ABUSE LAW AND MISAPPLIED THIS COURT'S DUE PROCESS TEST FOR GAUGING THE EVIDENCE SUPPORTIVE OF THE RESPONDENT'S CONVICTION.

The petitioner has argued at length that "consciousness of criminality" or guilty knowledge is not an indispensible factor in the application of every component of Maryland's Child Abuse Law to the respondent and that the Fourth Circuit rewrote the State's law to add this requirement. In *Pope v. State, supra,* the Court of Appeals of Maryland has obliterated any possible support for the Fourth Circuit's view of the statute. Judge Orth, speaking for the Court, stated that a person may be convicted in Maryland of the crime of child abuse if he or she:

(1) was
  (a) the parent of, or
  (b) the adoptive parent of, or
  (c) in loco parentis to, or
  (d) responsible for the supervision of

a minor child under the age of eighteen years, AND

(2) caused, *by being in some manner accountable for,* by act of commission *or omission,* abuse to the child in the form of
  (a) physical injury or injuries sustained by the child as the result of
    i) cruel or inhumane treatment, or
    ii) malicious act or acts by such person, or
  (b) any act or acts by such person involving sexual molestation or exploitation whether or not physical injuries were sustained.

A. 19a-20 (emphasis added).

Nowhere in this judicial expression of the meaning of the Maryland law do the words "knowingly and willfully" appear. And, in fact, under the Maryland court's definition of the crime, even acts of parental omission for which the accused is only "in some manner accountable" may trigger punishment if the resultant injury occurs. *Pope,* like *Fabritz,* involved a case where the defendant was accused not of "striking the blow," but of failing to seek medical help. Unlike *Fabritz,* which involves the child's natural mother, *Pope* involved one who was liable, if at all, only as a person "exercising temporary responsibility" for the supervision of the child. As in *Fabritz,* the Maryland court did not require subjective knowledge of the need for medical assistance, but only noted that the need therefor was, as an objective matter, "obviously compelling." *Compare Pope v. State,* A. at 10a-11a n.10 *with State v. Fabritz,* 276 Md. 416, 425, 348 A.2d 275, 280 (1975). The judges concluded that if Miss Pope were one of the persons subject to the Act, she could be convicted.

> Under the teaching of *Fabritz*, Pope's lack of any attempt to prevent the numerous acts of abuse committed by the mother over a relatively protracted period and her failure to seek medical assistance for the child, although the need therefor was obviously compelling and urgent, could constitute a cause for the further progression and worsening of the injuries which led to the child's death. In such circumstances, Pope's omissions constituted in themselves cruel and inhumane treatment within the meaning of the statute. *See Fabritz*, 276 Md. at 425-426, 348 A.2d at 280-81. It follows that Pope would be guilty of child abuse *if her status brought her within the class of persons specified by the statute.*

A. 20a (emphasis in original).

Quite clearly, under the Maryland court's interpretation of the Child Abuse Law, a parent may be punished if her or she, with wanton disregard of the consequences, fails to seek medical assistance for an injured child.[1]

Finally, belying the respondent's suggestion that the Court of Appeals of Maryland would now agree with the result reached in the Fourth Circuit, the Maryland court said of its decision in *Fabritz:*

> We had found it to be manifest from the evidence that the mother knew of the child's severely beaten condition and had failed for some eight hours to seek or obtain any medical assistance although, as the evidence plainly indicated, the need therefor was obviously compelling and urgent. We observed that there was evidence that the mother's failure to seek assistance was based upon her realization that the bruises covering the child's body would become known were the child examined or treated

[1] Even if scienter is required under the statute, there was ample evidence in this case to show that the respondent consciously refrained from seeking medical help for her child. *See* the State's petition at 14-15.

> by a physician. State v. Fabritz, 276 Md. 416, 425, 348 A.2d 275 (1975), *cert. denied*, 425 U.S. 942 (1976). Chief Judge Haynsworth was in accord. He did not agree with the majority of the panel that the record was devoid of evidentiary support. He found therein evidence sufficient to support a conclusion that the mother, though generally loving and protective of her daughter, consciously refrained from seeking medical help to protect her lover, the person who beat the child, from possible criminal charges and to support her own ego. "[A] conscious indulgence of such a preference,' he thought, "is in violation of Maryland's Child Abuse Law. . . ." ___ F.2d ___ (Haynsworth, C.J. dissenting) [slip opinion at 10-11].
>
> We note that, unlike decisions of the Supreme Court of the United States, decisions of federal circuit courts of appeals construing the federal constitution and acts of the Congress pursuant thereto, are not binding upon us. Declaration of Rights, Md. Const., Art. 2; Gayety Books v. City of Baltimore, 279 Md. 206, 213, 369 A.2d 581 (1977); Wiggins v. State, 275 Md. 689, 698-716, 344 A.2d 80 (1975). We are not persuaded to depart from our view of the evidence by the majority opinion of the federal appellate court.

A. 10a-11a n.10.

The respondent, in her brief in opposition to the State's petition for certiorari, argues that the Court of Appeals of Maryland decision in *Bowers v. State*, 283 Md. 115, 389 A.2d 341 (1978), somehow supports the Fourth Circuit's construction of Section 35A. Even aside from the clear expression of the State's highest court in *Pope*, a closer look at the opinion in *Bowers* exposes the weakness of the respondent's position. Unlike *Fabritz* or *Pope*, *Bowers* involved a parent who had struck the blows in question. The accused in that case challenged Section 35A as unconstitutionally vague, pointing to the statutory phrase, "cruel or

inhumane treatment." In determining the meaning of those words, the *Bowers* court stated:

> Webster's Third New International Dictionary defines the word "cruel" as "disposed to inflict pain [especially] in a wanton, insensate, or vindictive manner: pleased by hurting others: sadistic." The word "inhuman," a variant of "inhumane," is defined by the same authority as "lacking the qualities of mercy, pity, kindness, or tenderness: cruel, barbarous, savage. . . ." Black's Law Dictionary (4th ed. 1968) defines the term "cruelty" as "the intentional and malicious infliction of physical suffering upon living creatures, particularly human beings; . . . applied to the latter, the wanton and unnecessary infliction of pain upon the body." *See Caffas v. Bd. of Sch. Dirs. of Upper Dauphin Area,* 23 Pa. Commw. Ct. 578, 353 A.2d 898, 900 (1976). Clearly, then, the standard "cruel or inhumane" has a settled and commonly understood meaning. *See State v. Samter,* 4 Or. App. 349, 479 P.2d 237, 239 (1971).

283 Md. at 125-26, 389 A.2d at 347-48.

The Maryland court then focused on elements of these broad definitions in the particular context before it, *viz.*, parental discipline of children, and in light of settled common law principles applicable in that context said:

> So long as the chastisement was moderate and reasonable in light of the age, condition and disposition of the child, and other surrounding circumstances, the parent or custodian would not incur criminal liability for assault and battery or a similar offense. . . .
>
> On the other hand, where corporal punishment was inflicted with "a malicious desire to cause pain" or where it amounted to "cruel and outrageous" treatment of the child, the chastisement was deemed unreasonable, thus defeating the parental privilege and subjecting the parent to penal sanctions in those circumstances where criminal liability would have existed absent the parent-child relationship.

283 Md. at 126, 389 A.2d at 348.

Consistent with this discussion, the court said of Section 35A:

> Parents of ordinary intelligence are made aware that they do not subject themselves to the statute by merely engaging in corporal discipline for the purpose of punishment or correction. Only when the line is crossed and physical injury is intentionally and maliciously or cruelly inflicted does criminal responsibility attach. In short, the statute provides fair warning; it sets no trap for the unwary or innocent parent.

283 Md. at 128, 389 A.2d at 349.

The respondent's truncated version of the above quotation from *Bowers* and subsequent argument would have this Court believe that *in every case* arising under the act, i.e., battering cases as well as failure to seek assistance cases, the statute *always* requires an intentional and malicious or cruel act. This conclusion is utterly inconsistent with the broad definition accorded the phrase, "cruel or inhumane treatment" in *Bowers,* its narrow context of excessive parental discipline, and the Maryland court's application of the statute in omission cases.[2]

In short, nothing in *Bowers* supports the Fourth Circuit's imposition of a scienter requirement in Section

[2] Even if the requirement of an "intentional and malicious or cruel" act applied to omission cases as well as infliction of physical injury cases (as *Bowers* perhaps suggests), this result would not automatically imply the kind of scienter requirement imposed on § 35A by the Fourth Circuit. Clearly wanton disregard of the consequence of an act may constitute malice. *Cf.* New York Times v. Sullivan, 376 U.S. 254 (1964). *See* Commonwealth v. Taylor, 461 Pa. 557, 337 A.2d 545 (1975). And recklessness may constitute intentional conduct. *See, e.g.,* State v. Bolsinger, 221 Minn. 154, 21 N.W.2d 480 (1946).

35A cases like *Fabritz* (indeed *Bowers*, though cited to the federal appellate court, was not even mentioned in its decision).[3] And the decisions there and in *Pope* by the Court of Appeals of Maryland reaffirm its conclusion that the Maryland statute does not require consciousness of criminality in a person's failure to seek medical assistance for an injured child.

CONCLUSION

Finally, the petitioner strenuously takes issue with the respondent's characterization of this case as unimportant and nothing more than a factual dispute. As the Court of Appeals of Maryland made abundantly clear in *Pope*, it will not follow the Fourth Circuit decision. Nothing is more offensive to a state's highest court nor more devisive to Our Federalism than a federal court's reinterpretation of a state statute and reexamination of the state court's factfinding, particularly in an area such as child abuse where the states are just beginning to fashion remedies for a nationwide problem. *See Sims v. State Dept. of Public Welfare*, 438 F. Supp. 1179 (S.D. Tex. 1977), *prob. juris. noted sub nom. Moore v. Sims*, ___ U.S. ___, 58 L. Ed. 317 (1978).

[3] In fact, a reading of the majority opinion of the Fourth Circuit in *Fabritz* indicates that the court did not comprehend what kind of scienter requirement it was imposing, *viz.*, knowledge that the act was criminal or knowledge of the existence of the facts constituting the crime.

Under these circumstances, review of the Fourth Circuit decision is not only appropriate but necessary.

Respectfully submitted,

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APPENDIX

(Opinion filed January 19, 1979)

Court of Appeals of Maryland

No. 11, September Term, 1978

Joyce Lillian Pope,

Appellant,

v.

State of Maryland,

Appellee.

Opinion

ORTH, J., delivered the opinion of the Court. ELDRIDGE, J., filed an opinion concurring in part and dissenting in part.

Joyce Lillian Pope was found guilty by the court in the Circuit Court for Montgomery County under the 3rd and 5th counts of a nine count indictment, no. 18666. The 3rd count charged child abuse, presenting that "on or about April 11, 1976, . . . while having the temporary care, custody and responsibility for the supervision of Demiko Lee Norris, a minor child under the age of eighteen years [she] did unlawfully and feloniously cause abuse to said minor child in violation of Article 27, Section 35A of the Annotated Code of Maryland. . . ." The 5th count charged misprision of felony under the common law, alleging that on the same date she "did unlawfully and wilfully conceal and fail to disclose a felony to wit: the murder of Demiko Lee Norris committed by Melissa Vera Norris on April 11,

1976, having actual knowledge of the commission of the felony and the identity of the felon, with the intent to obstruct and hinder the due course of justice and to cause the felon to escape unpunished. . . ."[1]

On direct appeal the Court of Special Appeals reversed the judgment entered on the child abuse conviction and affirmed the judgment entered on the misprision of felony conviction.[2] *Pope v. State*, 38 Md. App. 520, 382 A.2d 880 (1978). We granted Pope's petition and the State's cross-petition for a writ of certiorari. We affirm the judgment of the Court of Special Appeals with respect to the 3rd count, child abuse. We reverse the judgment of the Court of Special Appeals with respect to the 5th count, misprision of felony. We remand to that court with direction to

[1] The remaining seven counts of the indictment, each concerning offenses committed on or about 11 April 1976 concerning or related to the minor child, alleged murder in the second degree — 1st count; manslaughter — 2nd count; accessory after the fact, murder — 4th count; obstruction of justice — 6th count; conspiracy to obstruct justice — 7th count; assault and battery — 8th count; assault — 9 th count. Before trial, the court granted Pope's motion to dismiss the 4th count. At the close of evidence offered by the State, the court granted Pope's motions for judgment of acquittal as to the 6th and 7th counts. At the close of all the evidence, the court reserved ruling on Pope's motions for judgment of acquittal on the remaining counts. It found her "sane" and not guilty on the 1st and 2nd counts, and "sane" and guilty on the 3rd and 5th counts. It held that the 8th and 9th counts merged with the 3rd count.

Pope was also charged in indictment no. 17830 with murder in the first degree. This indictment was nol prossed before trial.

[2] The trial court sentenced Pope to the Department of Corrections for a period of seven years on each of the convictions under the 3rd and 5th counts, the sentences to run concurrently. It suspended all but eighteen months of the sentence and recommended that it be served in the Montgomery County Detention Center. Upon release, Pope was to be placed on supervised probation for two years upon condition that she "seek and take psychiatric or psychological assistance."

remand to the Circuit Court for Montgomery County for the entry of a judgment of acquittal on the third count and dismissal of the fifth count.

Issues for Decision

I. The sufficiency of the evidence to sustain the conviction of Pope of the crime of child abuse as (1) a principal in the first degree, or (2) a principal in the second degree.

II. The status in Maryland of the crime of misprision of felony.

The Evidence

The evidence adduced at the trial[3] established that Demiko Lee Norris, three months old, died as a result of physical injuries inflicted by his mother, Melissa Vera Norris.[4] The abuse by the mother occurred over a period of several hours on a Sunday morning at Pope's home and in Pope's presence. Pope's involvement in the events leading to the child's abuse and death began on the preceding Friday evening when she and Melissa, with the child, were driven home by Pope's sister, Angela Lancaster, from a service held at the Christian Tabernacle Church. When they arrived at Melissa's grandparents' home, where Melissa was living, Melissa refused to enter the house, claiming that it was on fire, although in fact it was not. During the evening, Melissa had sporadically indicated mental distress. "She would

[3] The evidence at the trial consisted primarily of two extra-judicial statements given by Pope to the police, one written by her and the other tape recorded, and her testimony at trial, which was essentially repetitious of the statements. Pope's brief contains an agreed statement of facts pursuant to Maryland Rule 828 g. A summary of the evidence is given in the opinion of the Court of Special Appeals. Pope v. State, 38 Md. App. 520, 530-536, 382 A.2d 880 (1978).

[4] The mother, charged and tried separately from Pope, was found to be not responsible for her criminal conduct at the time of the commission of the offense, and, therefore, not guilty by reason of insanity. Maryland Code (1957, 1972 Repl. Vol.) Art. 59, § 25(a).

at times seem caught up in a religious frenzy with a wild look about her, trying to preach and declaring that she was God. She would as quickly resume her normal self without ever seeming to notice her personality transitions." *Pope,* 38 Md. App. at 531. Pope agreed to take Melissa and the child into her home for the night because she did not want to put them "out on the street," and Angela would not let them stay in her home. Melissa had no money and Pope and Angela bought food and diapers for the baby. That evening Pope cleaned and dried the baby and inquired of Melissa about a bad rash he had. Melissa slept in Pope's bedroom. Pope kept the baby with her in the living room, telling Melissa: "[Y]ou can go to sleep . . . I'll be up, I'll just stay up, I'll watch the baby. . . ." She explained in her testimony: "And I don't know why it was just, just a funny feeling that I had, you know, and ever since the baby was there I just kept it close to me for some reason." Pope fed the baby and fixed a bed for it in a dresser drawer. She stayed with the baby to care for him during the night because he was spitting up. She could not sleep while Melissa was there.

The next morning, awakened by the crying of the child, Pope fed him. Throughout the day Melissa "changed back and forth." When Melissa was "herself" she took care of her child. When Melissa thought she was God, Pope undertook the maternal duties. Pope watched the child "like it was my own," because "I felt maybe [Melissa] could [hurt the child] when she confessed she was God. . . . I felt close to the baby, maybe because, you know, I felt I haven't had a baby for so long, you know, I enjoyed taking care of the baby and watching it." At a baby shower Saturday evening at the home of Pope's mother, Melissa again reverted to being God, looking wild, speaking loudly, preaching and giving orders. Melissa and the baby returned to Pope's home. Melissa put the child in bed with her, but Pope thought it better that the child not remain there. She was afraid Melissa would roll over and "smother it to death." She told Melissa: "I'll just take the baby in

[the living room] . . . I'll watch it, I'll get up and feed it . . . I don't mind." The next morning, Sunday, at about 4:30 o'clock, Pope prepared the baby's bottle and fed him. When Melissa got up, Pope suggested that she go back to bed. Melissa behaved normally for awhile. Then her "episodes of 'changing to God' became more pronounced. She stomped and gestured as she strode back and forth, putting crosses on doors and demanding the departure of the evil which she claimed to see. She kicked and banged at the door of [Pope's] son, fearful that by breaking in Melissa would frighten him, [Pope] unfastened the door to permit entry. Loudly exhorting Satan to leave the premises, Melissa 'anointed' [Pope's] son with oil, placing some of the oil in the child's mouth. She subsequently repeated the process with [Pope's] daughter. When dressed, [Pope's] children left the house expeditiously, lingering only long enough to embrace their mother." *Pope,* 38 Md. App. at 531.

During a lucid period, Melissa prepared to go to church. She got a tub of water to bathe the baby. What next occurred is graphically described in the opinion of the Court of Special Appeals:

> "Then, from her suddenly changed voice and appearance, [Pope] knew Melissa had changed again to 'God.' Calling out that Satan had hidden in the body of her son, Melissa began to verbally exorcise that spirit and physically abuse the child by punching and poking him repeatedly about the stomach, chest and privates. After she undressed the child, that which ensued was hardly describable. In her religious frenzy of apparent exorcism, Melissa poked the child's vitals and beat the child about the head. She reached her fingers down its throat, wiping mucus and blood on diapers at hand, and even lifted the child by inserting her hands in its mouth, and shook him like a rag." *Id.*

Continuing to talk and stomp, Melissa began to squeeze the baby. Then, holding the child by the neck with one hand, she took him into the bathroom, acting like she

did not know that Pope was present. When she first started this abuse, Melissa, in her "God voice," called Pope and asked her: "Didn't I give you eyes to see?" Pope noticed that Melissa's finger nails were "real long," and she said to Melissa: "[H]ow do you handle a baby with such long nails," but Pope did nothing. She admitted that she knew at some point that Melissa was hurting the baby and was "fearful, amazed and shocked at the 'unbelievable' and 'horrible' thing that was happening."

Melissa's frenzy diminished. Angela came to the house to take them to church. Pope did not tell Angela what happened — "I could not get it out." Angela asked her what was wrong, and Pope said: "[I]t's Melissa, the baby. . . ." She locked the door at Angela's direction so Angela's children would stay in the yard with Pope's children. Angela wrapped the child in a towel, raised him over her head and prayed.

Pope, Melissa and Angela left with the child to go to the church. At Melissa's request they stopped by her grandfather's house, arriving about 2:00 p.m. Pope told him the child was dead, but he did not believe her because all three were acting so strangely. He refused to take or look at the baby. The three women with the child then went to Bel Pre Health Center, picked up another member of the Christian Tabernacle congregation, telling her that "God has a job for you to do," and proceeded to the church. Enroute, they passed several hospitals, police stations and rescue squads. At the church, the child was given to, or taken by the Reverend Leon Hart, who handed him to Mother Dorothy King for her prayers. She discovered that the baby's body was cool and sent for ambulance assistance. Police and rescue personnel arrived and determined that the child was dead. There was expert medical testimony that the child had died sometime during the period of fifteen minutes to several hours after it was injured. The medical expert expressed no opinion as to whether the child could have been

successfully treated if the injury had been reported sooner.

The police questioned Melissa in Pope's presence. Pope did not contradict Melissa's denial of abusing the child. In fact, Pope, in response to inquiry by the police, said that the baby did not fall, and told them that she had not seen Melissa strike the baby. She explained this untruth in subsequent statements to the police: "[I]t was her body in the flesh, but it wasn't her, because it was something else."

Pope, Melissa and Angela attended the evening service at the church. Melissa reverted to God during the service and Reverend Hart restrained her and attempted to convince her that she was not Jesus Christ. Melissa refused to go to her grandfather's home and returned home with Pope. The next morning Pope was again interviewed at the police station and wrote a full explanation of what had happened. She later made an oral statement which was recorded.

I.

The Crime of Child Abuse

The Statute

The General Assembly first evidenced its concern with the mistreatment of children fifteen years ago when it added § 11A to Art. 27 of the Maryland Code,[5] later codified as § 35A of that article,[6] declaring an assault on a child to be a felony. The statute in its entirety provided:

> "Any parent, adoptive parent or other person who has the permanent or temporary care or custody of a minor child under the age of fourteen years who maliciously beats, strikes, or otherwise mistreats such minor child to such degree as to require medical treatment for such child shall be guilty of a felony, and upon conviction shall be

[5] Acts 1963, ch. 743.

[6] Acts 1970, ch. 500.

> sentenced to not more than fifteen years in the Penitentiary."

The Legislature's increasing interest in child abuse is reflected in the amendment from time to time of the seminal statute.[7] The result is a comprehensive scheme to fulfill the legislative intent and purpose, expressed in 1973,[8] as "the protection of children who have been the subject of abuse by mandating the reporting of suspected abuse, by extending immunity to those who report in good faith, by requiring prompt investigations of such reports and by causing immediate, cooperative efforts by the responsible agencies on behalf of such children." Md. Code (1957, 1976 Repl. Vol.) Art. 27, § 35A. All of these were, of course, imposed over the felonious crime of child abuse. *See* subsections (a) through (j).

The Nature of Child Abuse

As we have seen, when the crime was first created by the General Assembly it comprised the malicious beating, striking or otherwise mistreating a child to such degree as to require medical treatment. We pointed out in *State v. Fabritz,* 276 Md. 416, 348 A.2d 275 (1975), *cert. denied,* 425 U.S. 942 (1976), that by the terms of the enactment it did not reach acts "not constituting, in one form or another, an assault on a child." *Id.* at 423. Acts 1973, ch. 835 repealed the "maliciously beats, strikes or otherwise mistreats" test of child abuse and substituted in its place a new and different measure of the offense. The 1973 amendment added a definition subsection to § 35A. Subsection (b)7 provided that whenever "abuse" was used in § 35A, it shall mean "any physical injury or injuries sustained by a child as a result of cruel or inhumane treatment or as a result of malicious act or acts. . . ." Acts 1974, ch. 554 designated this meaning

[7] *See* Acts 1964, ch. 103; Acts 1966, ch. 221; Acts 1967, ch. 38; Acts 1968, ch. 702; Acts 1970, ch. 500; Acts 1973, ch. 656; Acts 1973, ch. 835; Acts 1974, ch. 372; Acts 1974, ch. 554; Acts 1975, ch. 219; Acts 1977, ch. 290; Acts 1977, ch. 504.

[8] Acts 1973, ch. 835.

as item (A) of ¶7 and expanded the definition of child abuse by adding item (B) so as to include in the offense "any sexual abuse of a child, whether physical injuries are sustained or not." The amendment also added ¶8 defining "sexual abuse" to mean "any act or acts involving sexual molestation or exploitation, including but not limited to incest, rape, carnal knowledge, sodomy or unnatural or perverted sexual practices on a child. . . ." Acts 1977, ch. 290, substituted "or sexual offense in any degree" for "carnal knowledge" in ¶8.[9]

We considered the scope of item A, subsection (b)7 in *Fabritz.* Applying the rules of statutory construction, 276 Md. at 421-423, we thought "it evident that the Legislature plainly intended to broaden the area of proscribed conduct punishable in child abuse cases." *Id.* at 423-424. We said:

> "Its use in the amended version § 35A of the comprehensive phraseology 'who causes abuse to' a minor child, coupled with its broad two-pronged definition of the term 'abuse,' supports the view that the Legislature, by repealing the narrow measure of criminality in child abuse cases then provided in § 35A, and redefining the offense, undertook to effect a significant change of substance in the scope of the statute's prohibitions. In making it an offense for a person having custody of a minor child to 'cause' the child to suffer a 'physical injury,' the Legislature did not require that the injury result from a physical assault upon the child or from any physical force initially applied by the accused individual; it provided instead, in a more encompassing manner, that the offense was committed if physical injury to the

[9] In Bowers v. State, 283 Md. 115, 389 A.2d 341 (1978), we rejected the contention that the definition of abuse was so indefinite as not to comport with the established standards of due process. We opined that "the definition of abuse . . . represents a most suitable compromise between the constitutionally mandated requirements of specificity and the practical need to devise language flexible enough to combat a social evil of truly inestimable proportions." *Id.* at 129.

child resulted either from a course of conduct constituting 'cruel or inhumane treatment' or by 'malicious act or acts.'" *Id.* at 424.

We found that the failure of the mother to seek or obtain any medical assistance for her child, although the need therefor was obviously compelling and urgent, caused the child to sustain bodily injury additional to and beyond that inflicted upon the child by reason of the original assault by another. The act of omission by the mother "constituted a cause of the further progression and worsening of the injuries which led to [the child's] death; and that in these circumstances [the mother's] treatment of [the child] was 'cruel or inhumane' within the meaning of the statute and as those terms are commonly understood." *Id.* at 425-426. We therefore vacated the judgment of the Court of Special Appeals, which in *State v. Fabritz,* 24 Md. App. 708, 332 A.2d 324 (1975), had reversed the judgment of the trial court entered upon the conviction of the mother of child abuse.[10]

[10] Habeas corpus was refused by the United States District Court for the District of Maryland to the convicted mother. On appeal, the United States Court of Appeals for the Fourth Circuit by a majority of a three judge panel, Haynsworth, C.J. dissenting, vacated the judgment and remanded the case to the District Court to grant the writ. Fabritz v. Superintendent, ___ F.2d ___ [No. 77-1411, decided 28 September] (1978). In so doing the court accepted "the statute as valid, as did the Court of Appeals of Maryland and the District Court, and accept[ed], too, their clear exposition of the critical words of the law." ___ F.2d at ___ [slip opinion at 6]. It held that "[t]he statute simply was unconstitutionally applied." *Id.* It viewed the conviction void for denial of Fourteenth Amendment due process "because the 'conviction [is] based on a record lacking any relevant evidence as to a crucial element of the offense charged,' *i.e.,* that the mother had knowledge of the critical gravity of her daughter's condition when she deferred resort to medical advice for the little girl." ___ F.2d at ___ [slip opinion at 2-3].

We had found it to be manifest from the evidence that the mother knew of the child's severely beaten condition and had failed for some eight hours to seek or obtain any medical assistance although, as the evidence plainly indicated, the need therefor was obviously compelling and urgent. We observed that there was evidence that the mother's failure to seek assistance was based upon her realization that the bruises covering the child's body would become known were the child examined or treated by a physician. State v. Fabritz, 276 Md. 416, 425, 348 A.2d 275 (1975), *cert. denied,* 425 U.S. 942 (1976). Chief Judge Haynsworth was in accord. He did not agree with the majority of the panel that the record was devoid of evidentiary support. He found therein evidence sufficient to support a conclusion that the mother, though generally loving and protective of her daughter, consciously refrained from seeking medical help to protect her lover, the person who beat the child, from possible criminal charges and to support her own ego. "[A] conscious indulgence of such a preference," he thought, "is in violation of Maryland's Child Abuse Law. . . ." ___ F.2d ___ (Haynsworth, C.J. dissenting) [slip opinion at 10-11].

We note that, unlike decisions of the Supreme Court of the United States, decisions of federal circuit courts of appeals construing the federal constitution and acts of the Congress pursuant thereto, are not binding upon us. Declaration of Rights, Md. Const., Art. 2; Gayety Books v. City of Baltimore, 279 Md. 206, 213, 369 A.2d 581 (1977); Wiggins v. State, 275 Md. 689, 698-716, 344 A.2d 80 (1975). We are not persuaded to depart from our view of the evidence by the majority opinion of the federal appellate court.

Responsibility for Abuse of a Child

In *Fabritz* we went no farther than to determine that the Legislature intended that the "cause" of an injury may include an act of omission so as to constitute cruel or inhumane treatment, in that case the failure of the mother to seek or obtain medical assistance for her child who had been abused by another. *Fabritz* did not go to the class of persons to whom the statutory proscription applies, as the accused there was a "parent," the victim's mother, expressly designated in the statute.

We have seen that the statute as originally enacted concerned "[a]ny parent, adoptive parent or other person, who has the permanent or temporary care or custody of a minor child. . . ." Acts 1963, ch. 743. This has been once amended to bring within the ambit of the statute any person who has "responsibility for the

supervision of a minor child." Acts 1966, ch. 221. Thus, since 1 June 1966,

> "[a]ny parent, adoptive parent or other person who has the permanent or temporary care or custody or responsibility for the supervision of a minor child under the age of eighteen years[11] who causes abuse or such minor child shall be guilty of a felony. . . . § 35A(a).

Persons subject to the statute are designated in those terms also in subsection (b) 7(A) defining abuse and in subsection (b) 8 defining sexual abuse.

In *Bowers v. State,* 283 Md. 115, 389 A.2d 341 (1978), we discussed the class of persons to whom § 35A applies, in rejecting the contention that the statute was vague and therefore constitutionally defective for the reason that it failed to define adequately that class. Bowers urged that the statute was too indefinite to inform a person who is not a parent or adoptive parent of a child whether he comes within the ambit of the statute. He argued that no one in such position is capable of ascertaining whether the statute is aimed only at persons who have been awarded custody by judicial decree or includes also those who may simply be caring for a child in place of the parent. We were of the view that the General Assembly intended that the statute apply to persons who stand in loco parentis to a child. We said: "Had the Legislature wished to narrow application of the child abuse law to those who had been awarded custody or control by court order, it could readily have done so in explicit language to that end." *Id.* at 130. We observed that Bower's "own testimony amply established that he had assumed 'the care or custody or responsibility for the supervision' of his stepdaughter, and thus stood in loco parentis with respect to her." *Id.*

[11] Under Acts 1963, ch. 743 the statute applied to a child under the age of fourteen years. By Acts 1966, ch. 221 the statute was made applicable to a child under the age of sixteen years, and by Acts 1973, ch. 835 to a child under the age of eighteen years.

Bower's challenge centered on the "temporary care or custody" provision of the statute. It does not follow from our holding that "permanent or temporary care or custody" is synonymous with "responsibility for the supervision of." Such was clearly not the legislative intent, because, as we have seen, the latter provision was added by amendment three years after the former had been written into the law. There would have been no need to do so had the Legislature deemed the two provisions to have the same meaning.

The child abuse statute speaks in terms of a person who "has" responsibility for the supervision of a minor child. It does not prescribe how much responsibility attaches or what "responsibility" and "supervision" encompass. A doubt or ambiguity exists as to the exact reach of the statute's provision with respect to "has responsibility for the supervision of," justifying application of the principle that permits courts in such circumstances to ascertain and give effect to the real intention of the Legislature. *See Fabritz* at 423: *Clerk v. Chesapeake Beach Park,* 251 Md. 657, 663-664, 248 A.2d 479 (1968); *Domain v. Bosley,* 242 Md. 1, 7, 217 A.2d 555 (1966). *Bowers* equates "permanent or temporary care or custody" with "in loco parentis," but "responsibility for the supervision of" is not bound by certain of the strictures required for one to stand in place of or instead of the parent. A person in loco parentis is "charged, factitiously, with a parent's rights, duties, and responsibilities." Black's Law Dictionary (4th ed. 1951). "A person *in loco parentis* to a child is one who means to put himself in the situation of the lawful father [or mother] of the child with reference to the father's [or mother's] office and duty of making provision for the child. Or, as defined by Sir Wm. Grant, Master of the Rolls, a person *in loco parentis* is one, 'assuming the parental character and discharging parental duties.' *Weatherby v. Dixon,* 19 Ves. 412. . . . There must be some indication, in some form, of an intention to establish it. It is a question of intention." *Von der Horst v. Von der Horst,* 88 Md. 127, 130-131, 41 A. 124 (1898).

> "The term 'in loco parentis,' according to its generally accepted common law meaning, refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption. It embodies the two ideas of assuming the parental status and discharging the parental duties. *Niewiadomski v. United States,* 159 F.2d 683, 686 (6th Cir.), *cert. denied,* 331 U.S. 850 (1947).
>
> "This relationship involves more than a duty to aid and assist, more than a feeling of kindness, affection or generosity. It arises only when one is willing to assume all the obligations and to receive all the benefits associated with one standing as a natural parent to a child." *Fuller v. Fuller,* 247 A.2d 767 (D.C. 1968), *appeal denied,* 418 F.2d 1189 (1969).

A person may have the responsibility for the supervision of a minor child in the contemplation of § 35A although not standing in loco parentis to that child. "Responsibility" in its common and generally accepted meaning denotes "accountability," and "supervision" emphasizes broad authority to oversee with the powers of direction and decision. *See* American Heritage Dictionary of the English Language (1969); Webster's Third New International Dictionary (1968). As in the case of care or custody of a minor child under the child abuse law, a judicial decree is not necessary to obtain responsibility for the supervision of a minor child under that statute. Had the Legislature wished to narrow application of that law to those who had been charged with responsibility for the supervision of a child by court order, it could readily have done so in explicit language to that end. *See Bowers,* 283 Md. at 130. Absent a court order or award by some appropriate proceeding pursuant to statutory authority, we think it to be self-evident that responsibility for supervision of a minor child may be obtained only upon the mutual consent, expressed or implied, by the one legally charged with the care of the child and by the one

assuming the responsibility. In other words, a parent may not impose responsibility for the supervision of his or her minor child on a third person unless that person accepts the responsibility, and a third person may not assume such responsibility unless the parent grants it. So it is that a baby sitter temporarily has responsibility for the supervision of a child; the parents grant the responsibility for the period they are not at home, and the sitter accepts it. And it is by mutual consent that a school teacher has responsibility for the supervision of children in connection with his academic duties. On the other hand, once responsibility for the supervision of a minor child has been placed in a third person, it may be terminated unilaterally by a parent by resuming responsibility, expressly or by conduct. The consent of the third party in such circumstances is not required; he may not prevent return of responsibility to the parent. But, of course, the third person in whom responsibility has been placed is not free to relinquish that responsibility without the knowledge of the parent. For example, a sitter may not simply walk away in the absence of the parents and leave the children to their own devices.

Under the present state of our law, a person has no legal obligation to care for or look after the welfare of a stranger, adult or child.

> "Generally one has no legal duty to aid another person in peril, even when that aid can be rendered without danger or inconvenience to himself. . . . A moral duty to take affirmative action is not enough to impose a legal duty to do so." W. LaFave & A. Scott, Criminal Law 183 (1972).

See Clark & Marshall, A Treatise on the Law of Crimes § 10.02 (7th ed. 1967). The legal position is that "the need of one and the opportunity of another to be of assistance are not alone sufficient to give rise to a legal duty to take positive action." R. Perkins, Criminal Law 594-595 (2d ed. 1969). Ordinarily, a person may stand by with impunity and watch another being murdered, raped, robbed, assaulted or otherwise unlawfully

harmed. "He need not shout a warning to a blind man headed for a precipice or to an absentminded one walking into a gunpowder room with a lighted candle in hand. He need not pull a neighbor's baby out of a pool of water or rescue an unconscious person stretched across the railroad tracks, though the baby is drowning, or the whistle of an approaching train is heard in the distance." LaFave & Scott at 183. The General Assembly has enacted two "Good Samaritan" statutes which afford protection to one who assists another in certain circumstances. Those statutes, however, impose no requirement that assistance be rendered.[12]

In the face of this status of the law we cannot reasonably conclude that the Legislature, in bringing a person responsible for the supervision of a child within the ambit of the child abuse law, intended that such responsibility attach without the consent criteria we have set out. Were it otherwise, the consequences would go far beyond the legislative intent. For example, a person taking a lost child into his home to attempt to find its parents could be said to be responsible for that child's supervision. Or a person who allows his neighbor's children to play in his yard, keeping a watchful eye on their activities to prevent them from falling into harm, could be held responsible for the children's supervision. Or a person performing functions of a maternal nature from concern for the welfare, comfort of health of a child, or protecting if from danger

[12] Maryland Code (1957, 1976 Repl. Vol.) Art. 27, § 12A provides:

> "Any person witnessing a violent assault upon the person of another may lawfully aid the person being assaulted by assisting in that person's defense. The force exerted upon the attacker or attackers by the person witnessing the assault may be that degree of force which the assaulted person is allowed to assert in defending himself."

Code (1957, 1971 Repl. Vol., 1978 Cum. Supp.) Art. 43, § 132 grants immunity from liability from civil damages to physicians and certain other persons rendering aid under emergency conditions.

because of a sense of moral obligation, may come within the reach of the act. In none of these situations would there be an intent to grant or assume the responsibility contemplated by the child abuse statute, and it would be incongrous indeed to subject such persons to possible criminal prosecution.

The Sufficiency of the Evidence

The trial court found Pope guilty of the crime of child abuse as a principal in the first degree, and alternatively, as a principal in the second degree. A principal in the first degree is the one who actually commits a crime, either by his own hand, or by an inanimate agency, or by an innocent human agent. A principal in the second degree is one who is actually or constructively present when a felony is committed, and who aids or abets in its commission. *See Camphor v. State,* 233 Md. 203, 205, 196 A.2d 75 (1963); *Thornton v. State,* 232 Md. 542, 544, 194 A.2d 617 (1963); *Veney v. State,* 225 Md. 237, 238, 170 A.2d 171 (1961); *Agresti v. State,* 2 Md. App. 278, 280, 234 A.2d 284 (1967); 4 W. Blackstone, Commentaries *34; Clark & Marshall, A Treatise on the Law of Crimes §§ 8.01-8.02 (7th ed. 1967); L. Hochheimer, Crimes and Criminal Procedure §§ 31-32 (1st ed. 1897); R. Perkins, Criminal Law 656 and 658 (2d ed. 1969).[13]

[13] We have observed: "In Maryland, as in many other states, there is little practical difference between a principal in the first and second degree," and we characterized such difference as "a shadowy distinction." Vincent v. State, 220 Md. 232, 239, n.1, 151 A.2d 898 (1959). Clark & Marshall, A Treatise on the Law of Crimes (7th ed. 1976) elaborated the point:

> "The common law recognizes no difference in the punishment, between principals in the first and second degree, but regards them as equally guilty, and subject to the same punishment. In practice the distinction is immaterial and on an indictment charging one as principal in the first degree, he may be convicted on evidence showing that he was present aiding and abetting, and conversely.
>
> "And at common law a principal in the second degree may be indicted and convicted before trial of the

In convicting Pope, the trial court was "satisfied beyond a reasonable doubt that under the doctrine of [*Fabritz*] . . ., [she] is a principal [in the first degree] and is guilty of child abuse." It further held, however: "If this interpretation of *Fabritz* is in error, then [Pope] is guilty as a principal in the second degree." On direct appeal, the Court of Special Appeals applied Maryland Rule 1086 and set aside the judgment. The rule provides that when a criminal case is tried without the intervention of a jury, the Court of Special Appeals shall review both the law and the evidence but "the judgment of the [trial] court will not be set aside on the evidence unless clearly erroneous and due regard will be given to the opportunity of the [trial] court to judge the credibility of the witnesses." The appellate court's function "is merely to decide whether there was sufficient evidence, or proper inferences from the evidence, from which the trier of fact could properly draw the conclusion of the [accused's] guilt, beyond a reasonable doubt." *Brooks v. State,* 277 Md. 155, 161-162, 353 A.2d 217 (1976), and cases therein cited. The trial court, as the trier of facts, is not only the judge of the witness's credibility, but is also the judge of the weight to be attached to the evidence. *Id.* The Court of Special Appeals determined that the evidence was not legally sufficient to sustain the conviction of Pope either as a principal in the first degree or a principal in the second degree. The evidence was deficient with regard to her being a principal in the first degree in that it was not sufficient for the trier of fact to find beyond a reasonable doubt that she was within the class of

principal in the first degree, and even after he has been acquitted, or convicted of an offense of lesser degree, though the commission of the act by the principal in the first degree must be proved in order to convict one as aiding and abetting." *Id.* at § 8.05, p. 521.

See Hochheimer §§ 37-38. And "unless it is plain, from the nature of an offense made a felony by statute, that the provisions of the statute were intended to affect only the party actually committing the offense, aiders and abettors are punishable." Clark & Marshall at § 8.04, p. 520.

persons subject to the prohibitions of the child abuse statute. Thus, the teaching of *Fabritz* regarding "causing abuse" was in no event applicable. *Pope v. State,* 38 Md. App. at 538. It was deficient with regard to her being a principal in the second degree because, despite her presence during the commission of the felony, it was not sufficient for the trier of fact to conclude that she aided and abetted the actual perpetrator. Therefore, the judgment of the trial court on the evidence was clearly erroneous and had to be set aside. *Id.* at 539-541.

As did the Court of Special Appeals, we find evidentiary insufficiency with respect to the conviction of Pope of child abuse, both as a principal in the first degree and as a principal in the second degree, so that the judgment of the tiral court on the evidence was clearly erroneous. We, therefore, affirm the judgment of the Court of Special Appeals. We explain why we find that the evidence was legally insufficient.

Principal in the First Degree

As we have indicated, a person may be convicted of the felony of child abuse created by § 35A as a principal in the first degree upon evidence legally sufficient to establish that the person

(1) was
  (a) the parent of, or
  (b) the adoptive parent of, or
  (c) in loco parentis to, or
  (d) responsible for the supervision of
  a minor child under the age of eighteen years, AND
(2) caused, by being in some manner accountable for, by act of commission or omission, abuse to the child in the form of
  (a) physical injury or injuries sustained by the child as the result of
    i) cruel or inhumane treatment, or

ii) malicious act or acts by such person, or

(b) any act or acts by such person involving sexual molestation or exploitation whether or not physical injuries were sustained.

Under the teaching of *Fabritz,* Pope's lack of any attempt to prevent the numerous acts of abuse committed by the mother over a relatively protracted period and her failure to seek medical assistance for the child, although the need therefor was obviously compelling and urgent, could constitute a cause for the further progression and worsening of the injuries which led to the child's death. In such circumstances, Pope's omissions constituted in themselves cruel and inhumane treatment within the meaning of the statute. *See Fabritz,* 276 Md. at 425-426. It follows that Pope would be guilty of child abuse *if her status brought her within the class of persons specified by the statute.* It being clear that she was neither the child's parent nor adoptive parent, and there being no evidence sufficient to support a finding that she had "the permanent or temporary care or custody" of the child as that status was construed in *Bowers v. State, supra,* so as to be in loco parentis to the child, the sole question is whether she had "responsibility for the supervision of" the child in the circumstances. If she had such responsibility the evidence was legally sufficient to find her guilty of child abuse as a principal in the first degree.

The State would have us translate compassion and concern, acts of kindness and care, performance of maternal functions, and general help and aid with respect to the child into responsibility for the supervision of the child. The crux of its argument is that although Pope was not under any obligation to assume responsibility for the supervision of the child at the outset, "once she undertook to house, feed, and care for [the mother and child], she did accept the responsibility and came within the coverage of the statute." But the

mother was always present.[14] Pope had no right to usurp the role of the mother even to the extent of responsibility for the child's supervision. We are in full accord with the view of the Court of Special Appeals that it could not "in good conscience hold that a person who has taken in a parent and child is given the responsibility for the child's supervision and protection even while the child is in the very arms of its mother." *Pope,* 38 Md. App. at 538. It would be most incongruous that acts of hospitality and kindness, made out of common decency and prompted by sincere concern for the well-being of a mother and her child, subjected the Good Samaritan to criminal prosecution for abusing the very child he sought to look after. And it would be especially ironic were such criminal prosecution to be predicated upon an obligation to take affirmative action with regard to abuse of the child by its mother, when such obligation arises solely from those acts of hospitality and kindness.

The evidence does not show why Pope did not intervene when the mother abused the child or why she did not, at least, timely seek medical assistance, when it was obvious that the child was seriously injured. Whether her lack of action was from fear or religious fervor or some other reason is not clearly indicated. As the Court of Special Appeals correctly stated "[Pope's] testimony sought to indicate that her passivity was motivated by fear but other evidence belied that inference." *Pope,* 38 Md. App. at 532. The court observed that when Pope's sister arrived shortly after

[14] Before the Court of Special Appeals the State explained the mother's continual presence and exercise of supervision from time to time while she was awake as conduct permitted by Pope but manifesting "no indication whatsoever that [Pope] intended to relinquish her responsibility." As the Court of Special Appeals correctly observed: "That puts the cart before the horse. It is the mother whose responsibility was not relinquished or absolved." Pope v. State, 38 Md. App. 520, 537-538, 382 A.2d 880 (1978). Before us, the State has apparently abandoned the notion it suggested before the intermediate court.

the acts of abuse and the mother's frenzy had diminished, Pope did not tell her sister what had occurred, although she claimed that she tried to but could not do so. But Pope's conduct, during and after the acts of abuse, must be evaluated with regard for the rule that although she may have had a strong moral obligation to help the child, she was under no legal obligation to do so unless she then had responsibility for the supervision of the child as contemplated by the child abuse statute. She may not be punished as a felon under our sytem of justice for failing to fulfill a moral obligation, and the short of it is that she was under no legal obligation. In the circumstances, the mother's acquiescence in Pope's conduct was not a grant of responsibility to Pope for the supervision of the child, nor was Pope's conduct an acceptance of such responsibility. "[Pope's] concern for the child [did] not convert to legal responsibility nor parental prerogatives." *Pope,* 38 Md. App. at 538. We hold that the evidence was not sufficient in law to prove that Pope fell within that class of persons to whom the child abuse statute applies. Thus it is that the judgment of the trial court that she was a principal in the first degree in the commission of the crime of child abuse was clearly erroneous and must be set aside.

The mental or emotional state of the mother, whereby at times she held herself out as God, does not change the result. We see no basis in the statute for an interpretation that a person "has" responsibility for the supervision of a child, if that person believes or may have reason to believe that a parent is not capable of caring for the child. There is no right to make such a subjective judgment in order to divest parents of their

rights and obligations with respect to their minor children, and therefore, no obligation to do so.[15]

* * * * * *

[15] This State has enacted a comprehensive scheme, surrounded by safeguards, for determining whether a person is suffering from a mental illness or mental disorder so as to make it necessary or advisable for the welfare of the person so suffering or for the safety of the persons of property of others that the mentally ill person receive care and treatment. Maryland Code (1957, 1972 Repl. Vol., 1978 Cum. Supp.) Art. 59, § 1 *et seq.* It would be unthinkable to impose such a determination on an ordinary individual at the risk of criminal prosecution. Not even the "reasonable man," so often called upon by the law, has the expertise to make such a judgment.